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No. 86-547

In the Supreme Court of the United States

OCTOBER TERM, 1986

BETTY G. BROWNING, PETITIONER

v.

CLERK, UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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NOVEMBER 3, 1986

QUESTION PRESENTED

Does the Speech or Debate Clause bar a civil damages action brought by a legislative employee terminated for inadequate performance in relation to the conduct of a Congressional committee hearing?

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CLERK, UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., RESPONDENTS

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The respondents, the Honorable Benjamin J. Guthrie, Clerk of the United States House of Representatives; the Honorable Thomas P. O'Neill, Jr., Speaker of the House of Representatives; Thomas Ladd, the Assistant to the Clerk of the House of Representatives; and Geraldine Lyda, the Director of the Office of Official Reporters for the House of Representatives ("House parties") respectfully request that Betty G. Browning's petition for writ of certiorari be denied.

OPINIONS BELOW

Petitioner seeks review of *Browning v. Clerk, U.S. House of Representatives,* 789 F.2d 923 (D.C. Cir. 1986). The opinions are correctly identified in the Petition, although what Petitioner repeatedly describes as the separate opinions of Judges MacKinnon and Ginsburg are more accurately identified as concurrences in the Court of Appeals' unanimous decision to deny hearing.

JURISDICTION

Jurisdiction is accurately set forth in the petition.

STATEMENT OF THE CASE

Respondents are all officers and employees of the U.S. House of Representatives; the Petitioner, Betty G. Browning, is a former House employee. She served as an Official House Reporter until her discharge for unsatisfactory performance.

In December 1980, Petitioner Browning was assigned to report a hearing of the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce. The Subcommittee was investigating the role of organized crime in the hazardous waste disposal industry, and the hearing that Browning was to report was highly sensitive.[1] The Subcommittee had arranged for a direct confrontation, under oath, of two key witnesses: one an informant brought in specially from the Federal Witness Protection Program, the other a reputed mobster, who, allegedly, was among the select handful of persons directing organized crime's takeover of the toxic waste disposal industry. The Subcommittee hoped to obtain crucial information. Furthermore, it was anticipated that some of the testimony might ultimately present the possibility of a perjury prosecution. Because of the importance of the hearing and the expectation that the testimony might subsequently be used in judicial proceedings, the accuracy of Browning's work was crucial.

At the hearing, the two witnesses did in fact give strongly worded and directly contradictory testimony on a number of questions of great interest to both the public and the legislators. Upon review, however, the Subcommittee discovered, to its dismay, that Browning's report of the proceeding was so riddled with errors as to be virtually useless. She had missed whole chunks of testimony.

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[1] *Organized Crime and Hazardous Waste Disposal: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 2d Sess. (1980).

Much of what she had not missed was garbled beyond recognition.[2]

The Subcommittee Chairman dispatched a letter to the Office of the Clerk describing the incident and expressing deep dissatisfaction with Browning.[3] As a result of Browning's mistakes, the achievements of the hearing were largely lost, and the Subcommittee's investigation was hindered. In addition, both her supervisor and the Clerk's Office as a whole were severely embarrassed. When confronted with this disaster, Browning admitted she had done a poor job but refused to acknowledge the seriousness of the incident. Instead, she insisted that the problem was "minor," and that, in any event, whatever errors she made were fully excused by the emotional distress she felt at the time over her son's incarceration in the District of Columbia jail.[4]

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[2] The termination letter sent Browning by Respondent Thomas Ladd stated:

> By letter from the Chairman, we were advised that *large gaps existed in the transcript, in some cases comprising omissions of whole paragraphs of testimony*. . . . [Verification of the transcripts] revealed *gross errors and omissions* and has resulted in embarrassment to this office, as the supervisory office for official reporters, and to the U.S. House of Representatives.

Joint Appendix in the Court of Appeals ("J.A.") at 11 (emphasis added). This letter is part of the record in this case.

[3] *See supra* note 1.

[4] Browning's apparent lack of concern or contrition was noted in the termination letter:

> [Y]our response to this grave matter when revealed to you by your supervisor, Ms. Geraldine Lyda, indicates a complete disregard for the import of the situation. . . . Your failure to diligently pursue correction of the myriad of errors . . . reflects negatively on your ability to meet the demanding job requirements of your position.

J.A. at 11–12.

Petitioner's own affidavit, submitted as a supplement to her Complaint, verifies both the existence of the mistakes and her somewhat cavalier attitude towards them:

Continued

The Clerk's office had long been dissatisfied with Browning's performance. Her output was consistently the lowest in the reporters' corps.[5] Her lamentable performance at the hearing combined with her continued apparent indifference to the problems she had created proved the final straw, and her termination was initiated.

Although internal remedies were available to Browning, she did not avail herself of them.[6] Instead, she waited almost three years and then sued the Speaker of the House, her immediate supervisor, and two House officials, claiming that she had been discharged because of her race and that her due process rights had been violated.

Defendants moved to dismiss on grounds of Speech or Debate and official immunity. Based on a misunderstanding of the Court of Appeals decision in *Walker v. Jones*, 733 F.2d 923 (D.C. Cir.), *cert. denied*, 469 U.S. 1036 (1984), the district court denied the motion. Defendants appealed, and the Court of Appeals for the District of Columbia Circuit reversed. The Court of Appeals, per Judges Wald, Silberman, and MacKinnon, concluded that the district court had misconstrued and misapplied

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> At the time of this hearing, I was under great stress because my son was incarcerated in the District of Columbia Jail on criminal charges. . . . Although, because of my state of mind due to the above circumstances, *I made some mistakes* in the stenotype reporting of this hearing, I do not believe they were so extensive as Ms. Lyda claimed. . . .

J.A. at 16 (emphasis added).

[5] Plaintiff's own affidavit acknowledges that her "page production of hearing transcripts [was] low compared to other reporters." J.A. at 17; *see also* J.A. at 9, 11 (letters to Browning from Clerk's Office).

[6] The availability of internal remedies and Browning's failure to make use of them were raised below. The point was duly noted by the Court of Appeals, which stated that it was "not unmindful that Congress has provided for the resolution of its internal disputes." *Browning*, 789 F.2d at 930. The court declined to address the exhaustion question, however, because "on this interlocutory appeal the only question properly before the court is the question of Speech or Debate Clause immunity." *Id.* at 930 n.14.

Walker. The appellate court pointed out that *Walker* was an unusual and very narrow exception to the general rule applying Speech or Debate Clause immunity.

The Court of Appeals went on to discuss at length the importance of the role of an Official Reporter in the communicative and deliberative processes of Congress. *Cf. Gravel v. United States*, 408 U.S. 606, 624 (1972) (protection of privilege surrounding congressional communicative processes). The court found that such reporting was indeed an integral part of legislative functioning. Accordingly, the court concluded that the defendants' good faith in discharging Browning should not be subject to judicial investigation and review.

In reaching this conclusion, the court applied traditional Speech or Debate Clause analysis, relying almost exclusively on such classic Supreme Court cases as *Eastland v. United States Servicemen's Fund,* 421 U.S. 491 (1975); *Gravel, supra; Dombrowski v. Eastland,* 387 U.S. 82 (1967); and *Tenney v. Brandhove,* 341 U.S. 367 (1951). The court also gauged the practical consequences of permitting such a suit. As the court noted, in order to resolve Browning's claims, the judiciary:

> would necessarily have to inquire about matters at the very heart of the legislative process, such as the nature of the hearings to which Browning was assigned, the purposes underlying those hearings, and whether Browning's performance frustrated those purposes.

Browning, 789 F.2d at 930. The appellate court quite correctly recognized that "this sort of intrusion into the legislative sphere is exactly the sort of intrusion that the Speech or Debate Clause is designed to prevent." *Id.*

Browning petitioned the Court of Appeals for rehearing *en banc*. Her request was unanimously denied. Senior Judge MacKinnon, author of the *Browning* opinion, and Judge Ginsburg, author of the *Walker* opinion, attached very brief separate statements. *Browning,* 793 F.2d 380

(D.C. Cir. 1986) (denial of rehearing). Both concurred in the decision to deny rehearing.

On July 3, 1986, Browning filed the instant petition for certiorari, putting forth the theory that *Browning* conflicts with the rulings of other circuits.

REASONS FOR DENYING THE WRIT

The House Parties oppose granting certiorari because this case does not meet the standards set forth in Sup. Ct. R. 19. The ruling of the Court of Appeals does not conflict with the D.C. Circuit's own prior rulings or with those of other circuits. Its narrow, noncontroversial nature is illustrated both by the unanimity of the panel of Judges Wald, Silberman, and MacKinnon and the unanimity of the Circuit as a whole in denying the petition for rehearing.[7] Contrary to the suggestions of the petitioner, the question addressed and decided below was a narrow one. The decision concerns only a small number of Congressional employees, and its practical consequences are limited. Moreover, the Circuit's decision is in keeping with the tenor of this Court's Speech or Debate Clause interpretation.

1. *Browning* Does Not Conflict With the Views of the Fifth Circuit.

Browning's principal claim is that the D.C. Circuit and the Fifth Circuit are in conflict. She purports to find this conflict by contrasting the D.C. Circuit's opinion with the original Fifth Circuit panel opinon in *Davis v. Passman*, 544 F.2d 865 (5th Cir. 1977), *rev'd*, 571 F.2d 793 (5th Cir. 1978) (*en banc*), *rev'd*, 442 U.S. 228 (1979). The principal flaw in this argument is the very premise that the original panel decision in *Passman*, later reversed *en banc*, actually represents the current views of the Fifth Circuit. Such a premise is of very doubtful validity considering the tortured history of the *Passman* litigation, which is

[7] The petitioner's extensive reliance on the brief separate opinion of Judge Ginsburg regarding rehearing *en banc* is misplaced. Judge Ginsburg concurred in the Circuit's decision to deny rehearing.

reflected in the case cite. The Petitioner first asks this Court to infer the settled position of the Fifth Circuit from a divided panel opinion that was subsequently reversed *en banc*. She then asks this Court to rely on its inferences about the Fifth Circuit's views to grant certiorari. This is far too weak a thread upon which to hang a claim for a place on this Court's crowded docket.

In *Davis v. Passman*, a Congressional employee sued Louisiana Congressman Otto Passman, alleging that he had fired her solely because she was a woman and he wanted a man for the job. The District Court for the Western District of Louisiana dismissed the suit. A divided Fifth Circuit panel reversed. The two-judge panel majority declared that a private cause of action could be implied under the Fifth Amendment and that the employment decision was outside the scope of the Speech or Debate Clause. In reaching this conclusion, the majority made a number of questionable statements, including the assertion that the Clause is of very "limited scope," a position that flies in the face of this Court's stated view that the Clause must be "read . . . broadly to effectuate its purposes." *Eastland*, 421 U.S. at 501, a view subsequently emphasized by the observation that "the guarantees of that Clause are vitally important to our system of government and therefore are entitled to be treated by the courts with the sensitivity that such important values require." *Helstoski v. Meanor*, 442 U.S. 500, 506 (1979). Judge Jones dissented on the Speech or Debate point stating:

> It seems to me that the judges should refrain from wearing their robes in the halls of the Congress. The doctrine of separation of powers should, I believe, require the affirmance of the dismissal of this section.

Passman, 544 F.2d at 882 (Jones, J., dissenting).

Congressman Passman petitioned for rehearing *en banc*. His petition was granted, and the Court of Appeals for the Fifth Circuit sitting *en banc* reversed the panel's

majority decision. *Passman,* 571 F.2d 793, 795 (5th Cir. 1978) (*en banc*). The *en banc* court declared that no cause of action could be implied, and, therefore, did not reach the Speech or Debate Clause issue. This Court granted certiorari and reversed the decision of the *en banc* court. This Court concluded that a cause of action could be implied. Although four justices thought the Court should address the Speech or Debate Clause and separation of powers issues and declare them a bar to further litigation, *see Passman,* 442 U.S. at 249–55 (dissenting opinions), the majority declined to express its views in the absence of a definitive ruling from the Fifth Circuit, *see id.* at 236 n.12. The Court instead remanded. Because the parties subsequently reached an accommodation out of court, the Fifth Circuit never had the opportunity to clarify its views and its position remains uncertain.

In addition it must be noted that the *Passman* case differed starkly from this one. The *Passman* plaintiff had served until termination on the Congressman's personal staff. Furthermore, she had in her hand a letter from the Congressman saying that he was terminating her because she was a woman. Thus she could argue vigorously that her suit would not intrude at all into the Congressional committee investigative and legislative processs. In contrast, Browning's termination for poor performance on a Congressional investigation [8] would require the courts to haul in a Congressional committee to scrutinize its operations, and for the first time open up such investigations to outside distraction and harassment by multitudes of

[8] Here, the termination letter and other communications focused solely on the Plaintiff's inadequate job performance. The Plaintiff herself admits she made mistakes and that her output was low. Her case rides on the assertion that these deficiencies, although real, were not the true reason for her dismissal. Thus the controversy could only be adjudicated by inquiring closely into the internal procedures of the legislature, comparing Browning's treatment for her performance at committee hearings and meetings to the treatment accorded other employees, second-guessing the House's assessment of the seriousness of her errors, and probing the motives of those involved.

litigants—employees, witnesses, targets, the Executive Branch, or even Members with minority views. In *Eastland v. United States Servicemen's Fund,* this Court strongly affirmed its intention not to lend judicial process to those who seek to invade the sphere of Congressional investigations. In sum, the *Passman* case differs so fundamentally from this one that there could never have been a "conflict" in the holdings, even if the Fifth Circuit had let stand the divided *Passman* panel's opinion instead of reversing it *en banc.*

2. *Browning* Does Not Conflict With Decisions in Other Circuits.

Petitioner's claim that *Browning* conflicts with the law in circuits other than the Fifth is equally unfounded. Neither of the recent decisions in other circuits she cites present a conflict with the D.C. Circuit's ruling in *Browning.*

In *Agromayor v. Colberg,* 738 F.2d 55 (1st Cir.), *cert. denied,* 105 S. Ct. 515 (1984), the Court of Appeals for the First Circuit dismissed a legislative employee's discrimination suit, finding the defendant legislator immune, just as the District of Columbia Circuit did here.

Agromayor, a journalist of Argentine birth, applied unsuccessfuly for a job as press officer to the Puerto Rican House of Representatives. Initially, the Minority Leader indicated a willingness to hire him. Shortly thereafter, however, the Plaintiff published articles in a local newspaper sharply criticizing the legislature in general and the President of the Puerto Rican House in particular. The President—Defendant Colberg—then told Agromayor that, because of his negative comments and because he was not a native Puerto Rican, he would not be hired. Agromayor sued the House President under section 1983 alleging, *inter alia,* discrimination on the basis of national origin.

The First Circuit accepted as true Agromayor's allegation that he had been denied employment because of his Argentine birth. *See Agromayor,* 738 F.2d at 58. The court nevertheless concluded that the Defendant legislator was

immune. Even though the Defendant had made no allegations of performance deficiencies,[9] and even though the Plaintiff's duties, if he had been hired, would have involved external public relations rather than the internal functioning of the House, the First Circuit had no doubt that his discrimination suit was barred. That Circuit reasoned that any "employee dealing with the deliberative and communicative processes *must be* of direct legislative importance." *Id.* at 60 (emphasis added) (citations omitted). Obviously, an Official Reporter "deal[s] with the deliberative and communicative processes." Thus, under the First Circuit's formulation, Browning's suit must be barred just as Agromayor's was. Far from conflicting with *Browning,* the *Agromayor* court's reasoning leads to the same conclusion: Browning's suit is not justiciable.

The petitioner also claims to find a "circuit split" in *McMillan v. Svetanoff,* 793 F.2d 149 (7th Cir. 1986), *cert. pending,* No. 86-384 (application filed Sept. 8, 1986). In reality, *Svetanoff* is very different both factually and legally. Indeed, petitioner herself implicitly concedes that

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[9] In *Agromayor,* for example, the Defendants never claimed that the Plaintiff was deficient in the necessary skills or incompetent in any way. It was, in essence, conceded by all sides that the Defendant's refusal to hire him was not job-related in the strict sense. Adjudication could have been had without analyzing anyone's performance within the legislature. The present case is strikingly different. Here, the termination letter and other communications focused solely on the Plaintiff's inadequate job performance.

Agromayor also involved a "state" legislature and thus common law immunity. The present case deals with the U.S. House of Representatives and, therefore, implicates the Speech or Debate Clause of the U.S. Constitution. Although the common law immunity and Speech or Debate Clause doctrines share certain underpinnings, they are different in source and cannot be assumed to be coextensive. *See United States v. Gillock,* 445 U.S. 360 (1980). The First Circuit duly noted this consideration in *Agromayor.* The court observed that "unlike the constitutional immunity for Congressmen, [common law] immunity is not based upon the separation of powers" and, consequently, "decisions construing the Clause do not necessarily define the boundaries of the section 1983 immunity." *Agromayor,* 738 F.2d at 58, 59.

there is no *bona fide* conflict between the two cases when she attempts to finesse the point with the claim that they differ "in principle."

Svetanoff involved an employment dispute in the state court system.[10] The doctrine of immunity for state judges, dealt with in *Svetanoff,* is a common law doctrine created in response to practical concerns. The Speech or Debate Clause upon which this case turns is very different. Speech or Debate immunity derives from the text of the Constitution. Its purpose is to reinforce the Separation of Powers—to prevent overreaching by the Executive and possible intimidation before a hostile judiciary. Because of the different sources and purposes of the two immunities there is no reason to expect them to function in the same way, and they do not.[11]

CONCLUSION

Responsible House officials terminated Petitioner because her inadequate performance damaged an important Subcommittee investigation and discredited the Congress of the United States. The Court of Appeals correctly determined that the power to make such a termination decision is a necessary incident of the Legislative Branch's constitutional power to manage its own affairs and could

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[10] An elected state judge had begun his service with the wholesale firing of the entire staff of his courtroom. There was no suggestion that any of the firings resulted from poor job performance. One of the employees, McMillan, filed suit claiming discrimination on the basis of race and party affiliation. The Seventh Circuit rejected the judge's immunity claim on the grounds that a long line of cases had established the relatively narrow focus of the judicial immunity doctrine and application of the immunity here would "not further the objective of the doctrine." *Id.* at 155.

[11] *Svetanoff* indicates that the litigation of a court employee's claim against one member of the judiciary before another member of the judiciary may be accomplished without threatening the purposes of the common law doctrine of judicial immunity. It does not follow that an official reporter's claim against the House may be litigated before another branch, the judiciary, without jeopardizing the Separation of Powers principles crystallized in the Speech or Debate Clause.

not, consistent with the Speech or Debate Clause, be subjected to judicial review. The court's carefully reasoned opinion falls in the mainstream of judicial reasoning in the Speech or Debate Clause area and requires no review by this Court. Accordingly, the Respondents respectfully request that the writ of certiorari be denied.

Respectfully submitted,

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